LEGAL MEMORANDUM

A Constitutional Analysis of Proposals to Ban Tobacco Product Advertising

Prepared by
Covington & Burling
Washington, DC
20004

The analysis presented in this memorandum would apply to federal legislation discriminating against advertising for any product—not just legislation discriminating against tobacco product advertising

2044030849

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

A Constitutional Analysis of Proposals to Ban Tobacco Product Advertising

In December 1985, the American Medical Association's House of Delegates approved a resolution calling for a legislative ban on advertising and promotion of tobacco products. The AMA's Board of Trustees subsequently proposed draft legislation to implement a ban, which Rep. Synar of Oklahoma introduced in the 99th Congress as H.R. 4972. In the 100th Congress, Rep. Whittaker has reintroduced Rep. Synar's bill in its original form (H.R. 1532), and Rep. Synar has introduced a new version of his bill that would accomplish the same goal (H.R. 1272).

Applying the Supreme Court's test for restrictions on commercial speech, we believe that the ban proposed by Reps. Synar and Whittaker would be held to be unconstitutional. Under the test set forth in the *Central Hudson* case, and reaffirmed in *Posadas*, restrictions on commercial speech cannot be sustained unless, among other things, they "directly advance" a substantial governmental interest and that interest cannot be served by any "less restrictive" means. In our judgment, the measures proposed by Reps. Synar and Whittaker would not satisfy either of those elements of the governing *Central Hudson* test.

We are convinced, in that connection, that the Supreme Court's scrutiny of the Synar/Whittaker proposals would be far more exacting than was its scrutiny of the casino-gambling advertising restrictions upheld in *Posadas*. The restrictions at issue in that case were so porous, so lacking in actual substantive effect, that the majority apparently consid-

2044030850

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

ered it unnecessary to undertake a searching inquiry of the interests purportedly being served or of alternatives that may have been available. The complete advertising ban sought by Reps. Synar and Whittaker would call—under a long line of cases not overruled by *Posadas*—for a careful weighing of the interests affected and the possible alternatives. We do not believe that the proposals could survive such scrutiny.

The AMA's call for a tobacco product advertising ban has provoked an extraordinary First Amendment outcry from across the political spectrum—ranging from the ACLU to the Justice Department, and including the most distinguished constitutional scholars in the nation.[1] On February 16, 1987, the American Bar Association rejected a resolution urging it to endorse the proposed ban, and it did so—according to ABA President Eugene Thomas—because of free-speech concerns.[2] The opposition to a

---

[1] Critics include Professor Alan Dershowitz of Harvard Law School, Professor Philip B. Kurland of Chicago Law School, Professor Martin H. Redish of Northwestern Law School, Professor William Van Alstyne of Duke Law School, and Professor Charles Alan Wright of Texas Law School, among others. These scholars oppose a tobacco product advertising ban on First Amendment grounds notwithstanding *Posadas*. *See also* Oliver, "FTC Chairman's Report," *Advertising Age*, April 13, 1987, p. 18 ("We must oppose these efforts to place the government in the position of controlling what we read and what we see.").

[2] Interview, *Advertising Age*, Feb. 23, 1987, p. 80. Other bar groups opposing the proposed advertising ban on First Amendment grounds include the Communications Law Committee of the Association of the Bar of the City of New York, the Special Committee on Media Law of the New York State Bar Association, the First Amendment Committee of the ABA Section on Individual Rights and Responsibilities, the Joint ABA/ANPA Task Force, the ABA National Conference

2044030851

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

tobacco product advertising ban rests on a broad-based commitment to First Amendment values that *Posadas* has done nothing to lessen. *See, e.g.*, Editorial Commentary, "Bills to Ban Cigarette Adveritsing Threaten Freedom of Speech," *Barron's*, March 2, 1987, p. 11.

1. The Scope of the Proposed Ban

The sweep of the ban on tobacco advertising and promotion proposed by the AMA, and reflected in the Synar/Whittaker bills, should be clearly understood. The proposed legislation would apply to advertising of all tobacco products, from cigarettes, cigars and pipes to chewing tobacco and snuff. It would apply not only to manufacturers and retailers of tobacco products but to anyone who, for whatever reason, desires to advertise tobacco products. And it would apply to all significant advertising media—including billboards, newspapers and magazines.

The proposed ban on "promotion" would prohibit tobacco product manufacturers from sponsoring athletic, artistic or other events under the registered brand name of a tobacco product, and from marketing non-tobacco products or services bearing the registered brand name or logo of a tobacco product. The legislation would apply without differentiation to all types of messages—advertising that advises consumers of objective brand-related information (for example, relating to "tar" and nicotine content), as well as advertising that makes standard appeals to consumer preferences (for example, claiming that a par-

---

of Lawyers and Representatives of the Media, the Federal Communications Bar Association, the Federal Bar Association, and the Illinois Bar Association. The General Counsel of the American Lung Association recently resigned in protest over that group's support for a tobacco product advertising ban. *Advertising Age*, May 11, 1987, p. 104.

2044030852

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

ticular brand "tastes great" or promoting a brand to a particular segment of the adult smoking public).

In sum, the bills would ban any and all communications "used for promoting the sale or consumption of tobacco products to consumers."

* * * *

The Synar/Whittaker proposals bear no resemblance to the casino-gambling advertising restrictions at issue in *Posadas* v. *Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986). Those restrictions were restrictions in name only, forbidding casino-gambling advertising "addressed" to residents of Puerto Rico but permitting all other casino-gambling advertising —however accessible to Puerto Ricans. The Puerto Rico Legislature had imposed these restrictions in 1948, when it legalized casino gambling "to contribute to the development of tourism" on the island. 106 S. Ct. at 2972. Counsel for Puerto Rico conceded during oral argument in the Supreme Court that casino advertising in a Spanish-language daily with 99-percent local circulation would be permitted—so long as the advertising "is addressed to tourists and not to residents." Oral Arg. Tr. 26. In other words, while Puerto Ricans could not be "invited" to visit casinos, the restrictions considered in *Posadas* did nothing to prevent Puerto Ricans from learning about or patronizing them. By contrast, the ban proposed by Reps. Synar and Whittaker would destroy cigarette advertising as a means of communicating with smokers about individual cigarette brands.

2. The Development of the Commercial Speech Doctrine

Before 1976, commercial speech was considered by the courts to be outside the ambit of the First Amendment. Then, in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S.

2044030853

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

748 (1976), the Supreme Court announced a new principle—truthful speech proposing lawful commercial transactions is protected by the First Amendment.[3] Applying the principle in that case, the Supreme Court invalidated a state law forbidding licensed pharmacists to advertise the prices of prescription drugs. Since then, it has applied the principle to invalidate—

—a township ordinance forbidding the posting of "For Sale" and "Sold" signs in residential neighborhoods for the purpose of stemming white flight[4];

—a state law banning the advertising and display of contraceptives,[5] and a federal law forbidding the mailing of unsolicited advertisements for contraceptives[6];

—various state-law restrictions on print-media advertising by lawyers[7]; and

—a state public service commission regulation banning promotional advertising by electric utilities.[8]

---

[3] This decision was foreshadowed by the Court's holding in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), that a state may not forbid advertisements announcing the availability of legal abortions.

[4] *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977).

[5] *Carey* v. *Population Services International*, 431 U.S. 678 (1977).

[6] *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

[7] *Bates* v. *State Bar*, 433 U.S. 350 (1977); *In re R.M.J.*, 455 U.S. 191 (1982); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

[8] *Central Hudson Gas & Electric Corp.* v. *PSC*, 447 U.S. 557 (1980).

2041030854

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

In two cases, the Court has sustained, or indicated that it would sustain, laws that limit the media through which advertisers may promote their products.[9] But in upholding such restrictions, the Court placed great weight on the fact that they applied to *all* speakers, regardless of their message; it was the medium—not the message—that the authorities found offensive.[10] Since 1976, the Court had sustained a content-based restriction on speech in only one case prior to *Posadas*. But that case involved a Texas statute that simply prohibited the practice of optometry under a trade name—a form of commercial speech that the state had found to be deceptive, and one that the Court held has "no intrinsic meaning" and "conveys no information."[11] In no case since 1976—not even *Posadas*—has the Court "approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."[12]

---

[9] *City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding ordinance prohibiting posting of signs on utility poles); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) (indicating that ordinance banning billboard advertising would be upheld but reserving question whether ban on *all* outdoor advertising would survive a First Amendment challenge).

[10] *Taxpayers for Vincent*, 466 U.S. at 804-05; *Metromedia, Inc.*, 453 U.S. at 505-12.

[11] *Friedman* v. *Rogers*, 440 U.S. 1, 12-16 (1979).

[12] *Central Hudson*, 447 U.S. at 566 n.9. The Court has stressed that the government "may not completely suppress the dissemination of truthful information about entirely lawful activity merely because it is fearful of that information's effect upon * * * its recipients." *Metromedia*, 453 U.S. at 505 (plurality opinion); *id.* at 541 (Stevens, J., joining pertinent portion of plurality opinion). In *Capital Broadcasting*

2044030855

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

Before further discussion of *Posadas*, it may be well to understand the two core values that led the

---

Co. v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (3-judge court), *aff'd mem.*, 405 U.S. 1000 (1972), the Supreme Court, without opinion, affirmed a district court decision sustaining the restriction on cigarette advertising in the electronic media (15 U.S.C. § 1335). But the Supreme Court took that action four years before *Virginia State Board of Pharmacy*.

In a handful of cases, lower courts have sustained restrictions on advertising of alcoholic beverages. *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E.2d 138 (per curiam), *appeal dismissed*, 459 U.S. 807 (1982); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital City Cable Ass'n* v. *Crisp*, 467 U.S. 691 (1984); *Dunagin* v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984); *R.I. Liquor Stores Ass'n* v. *Evening Call Publishing Co.*, 497 A.2d 331 (R.I. 1985); *S & S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729 (R.I. 1985). In all of these cases, however, the courts relied heavily on the power to regulate traffic in alcoholic beverages specifically conferred upon the states by the Twenty-First Amendment. *E.g.*, *R.I. Liquor Stores Ass'n*, 497 A.2d at 337 n.7.

At least two state courts have invalidated liquor advertising restrictions under the First Amendment. *Brooks* v. *Delaware*, 442 A.2d 93, 95-96 (Del. Super. Ct. 1981); *Heir* v. *Degnan*, 82 N.J. 109, 411 A.2d 194, 202 (1980). *See generally* Note, "Liquor Advertising: Resolving the Clash Between the First and Twenty-First Amendments," 59 N.Y.U. L. Rev. 157, 178-79, 183-85 (1984); Note, "Restraints on Alcoholic Beverage Advertising: A Constitutional Analysis," 60 Notre Dame L. Rev. 779 (1985). In May 1986, a federal district court struck down Oklahoma's alcoholic beverage advertising ban under the Equal Protection Clause of the Fourteenth Amendment as an ineffective and therefore irrational means of achieving the state's asserted goals. *Oklahoma Broadcasters Ass'n* v. *Crisp*, No. CIV-81-1756-W (W.D. Okla. May 30, 1986). As discussed below, a tobacco product advertising ban would suffer from the same infirmity.

2044030856

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

Supreme Court to extend the First Amendment's protections to commercial speech.

First, we live in a society that does not tolerate information rationing by government—government attempts to manipulate our behavior by curtailing our access to information and ideas.[13] For that reason, among others, "the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others." [14] Whether the speech involved is "commercial" or "noncommercial" in nature, the First Amendment condemns paternalistic efforts by government to advance our welfare by keeping us in the dark, shielding us from viewpoints with which it disagrees and from information that it does not like. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." [15]

Second, "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable

---

[13] *Central Hudson*, 447 U.S. at 578 (concurring opinion). *See Linmark*, 431 U.S. at 96; *Carey*, 431 U.S. at 701; *Metromedia*, 453 U.S. at 505; *Bolger*, 463 U.S. at 79 (Rehnquist, J., joined by O'Connor, J., concurring in judgment).

[14] *Taxpayers for Vincent*, 466 U.S. at 804 (citing commercial-speech and noncommercial-speech cases alike as establishing this "general principle").

[15] *See Virginia State Board of Pharmacy*, 425 U.S. at 770. Even Chief Justice Rehnquist, who initially resisted recognizing First Amendment protection for commercial speech and wrote for the majority in *Posadas*, stated in his concurring opinion in *Bolger* (463 U.S. at 79) that government may not suppress expression to manipulate behavior.

2044030857

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

role in the allocation of resources in a free enterprise system. * * * [S]uch speech serves individual and societal interests in assuring informed and reliable decision making." [16] As the Supreme Court stated in *Virginia State Board of Pharmacy*:

> "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." 425 U.S. at 765.

Because these twin values—one political, the other economic—are so fundamental to our system, the Supreme Court has not hesitated to invalidate restrictions on commercial speech even when the asserted justification for the restriction was substantial. Thus, for example, in *Linmark*—where a township had forbidden the posting of "For Sale" and "Sold" signs in residential neighborhoods to stem white flight—the Court invalidated the restriction even though it acknowledged that the restriction served "the vital goal" of promoting stable, racially integrated housing.[17] In *Central Hudson*—where the state

[16] *Bates*, 443 U.S. at 364 (citing *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring), and *Virginia State Board of Pharmacy*, 425 U.S. at 761-65).

[17] *Linmark*, 431 U.S. at 94. The Court stressed that the "basic" constitutional defect in the ordinance was its attempt to manipulate the behavior of the township's residents by preventing them from obtaining information. *Id.* at 96-97.

2044030858

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

had banned promotional advertising by electric utilities—the Court invalidated the ban even though it agreed that energy conservation is an "imperative national goal." [18] Indeed, in most of the Supreme Court's commercial speech cases since 1976, the government has advanced justifications that the Court accepted as "substantial." But in *none* of those cases did the Court permit the justifications to serve as a basis for content-based restrictions on truthful commercial speech prior to *Posadas*.

In short, restrictions on truthful speech proposing lawful commercial transactions inevitably conflict with fundamental values protected by the First Amendment. Although the majority opinion in *Posadas* indicates that not every restriction on speech interfering with these First Amendment values automatically will be invalidated on that basis, nothing in *Posadas* reasonably can be interpreted as signaling the Court's rejection of those values—or as permitting a legislature or reviewing court to ignore them in considering restrictions on speech.

3. The Invalidity of the Synar/Whittaker Bills Under *Central Hudson*

Reaffirming its commitment to the core values that underlie the First Amendment protection accorded to commercial speech, the Court in *Central Hudson* articulated a four-part test for assessing the validity of speech restrictions:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the

[18] *Central Hudson*, 447 U.S. at 571.

2044030859

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

> asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

Tobacco product advertising obviously concerns a lawful activity—an activity that has been lawful for many years (unlike casino gambling or prostitution). Likewise, such advertising is not inherently misleading.[19] Thus, tobacco product advertising qualifies for protection under the first prong of the *Central Hudson* test. Assuming for purposes of this discussion (and only for purposes of this discussion) that the Synar/Whittaker proposals aim to serve a "substantial" government purpose—the second prong of *Cen-*

---

[19] The AMA Board of Trustees has pointed to a 1981 FTC staff report as suggesting that cigarette advertising may be deceptive by virtue of the themes and images it employs. *Report AA (I-85)*, p. 1. *See also* Synar statement, 132 Cong. Rec. E2020 (June 10, 1986). Significantly, the Tenth and Fifth Circuit Courts of Appeals have rejected a comparable justification for bans on liquor advertising. *Crisp*, 699 F.2d at 500 & n.9; *Dunagin*, 718 F.2d at 743.

The AMA Board also has suggested that some advertising for filtered or low-"tar" cigarettes is misleading insofar as it implies that such cigarettes are safe. But the FTC already has made clear that advertising explicitly or implicitly representing that low-"tar" or low-nicotine cigarettes present no health risks is forbidden. *FTC Cigarette Advertising Guides*, 4 Trade Reg. Rep. (CCH) ¶ 39,012.70, p. 41,603. At the same time, the FTC has emphasized that "it is in the public interest to promote the dissemination of truthful information concerning cigarettes which may be material and desired by the consuming public." *Ibid.* Section 5 of the FTC Act, 15 U.S.C. § 45, forbids "false" or "deceptive" commercial acts or practices, and the FTC is empowered to pursue those who violate that prohibition.

2044030860

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

tral Hudson—the proposals still could not survive a First Amendment challenge because they would not satisfy the other two elements of the *Central Hudson* test.

(a) ***The Proposals Are Unlikely To Achieve Their Stated Purpose***

The proposed ban would not "directly advance" the asserted governmental interest—curtailing the use of tobacco products. This prong of the *Central Hudson* test precludes a court from simply deferring to a legislative determination that suppression of an entire category or form of commercial speech provides effective and direct support for the government's asserted interest. As the Court in *Central Hudson* stressed, the courts must "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." [20]

---

[20] *Central Hudson,* 444 U.S. at 566 n.9. *See also City of Los Angeles* v. *Preferred Communications, Inc.,* 106 S. Ct. 2034, 2038 (1986) ("This Court 'may not simply assume that [an] ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.' ") (quoting *Taxpayers for Vincent,* 466 U.S. at 803 n.22)). The Supreme Court's review of the connection between advertising restrictions and the government's asserted interests has been particularly rigorous in those cases involving a complete ban or especially severe restrictions. The Court pointedly noted in *Linmark* that no "definite connection" had been shown between the township's goal of integrated housing and its ban on the posting of "For Sale" and "Sold" signs in residential neighborhoods (431 U.S. at 565 n.7), and it observed that in both *Virginia State Board of Pharmacy* and in *Bates* no showing had been made that the advertising restrictions there at issue would be a direct and effective way of advancing the interests invoked to justify them (*id.* at 564-65). Likewise, the Court in *Bolger* found that the federal government's ban on sending unsolicited contra-

2044030861

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

The available evidence indicates that advertising expenditures do not significantly affect large, mature consumer markets other than at the brand level and that tobacco advertising serves primarily as a vehicle for intense interbrand rivalry. The avowed purpose and demonstrated effect of such advertising is to prompt people who already smoke to shift brands, or to remain loyal to the brand being advertised, rather than to attract new smokers.[21] In its 1987 Annual Report to the President, the Council of Economic Advisors stated:

---

ceptive advertising through the mail was too "marginal" a means of advancing the government's "undoubtedly substantial" interest in helping parents control the education of their children. 463 U.S. at 73.

[21] *E.g.*, M.J. Waterson, *Advertising and Cigarette Consumption* 12-14 (1983). Reviewing the literature in 1971, Judge Skelly Wright stated: "While cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke." *Capital Broadcasting Co.*, 333 F. Supp. at 588 (dissenting opinion) (footnote omitted). The Surgeon General, in a 1979 report, agreed that "the major action of cigarette advertising now seems to be to shift brand preferences, to alter market share for a particular brand." *Smoking & Health: A Report of the Surgeon General* 18-23 (1979).

Extensive expert testimony to the same effect was presented in congressional subcommittee hearings in August 1986. *Advertising of Tobacco Products: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce,* 99th Cong., 2d Sess. 640, 708, 666, 811 (1986) ("1986 Hearings") (statements of Dr. J.J. Boddewyn, Dr. Roger D. Blackwell, Dr. Scott Ward, and Michael J. Waterson). *See also Advertising of Tobacco Products: Hearing before the Subcomm. on Transportation, Tourism and Hazardous Materials of the House Comm. on Energy and Commerce,* 100th Cong., 1st Sess. (1987) ("April 1987 Hearing") (statement of Howard H. Bell, President, American Advertising Federation).

2044030862

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

> "There is little evidence that advertising results in additional smoking. As with many products, advertising mainly shifts consumers among brands." [22]

In fact, tobacco product consumption actually has increased in most countries in which cigarette advertising has been banned.[23]

---

[22] *Economic Report of the President* 186 (1987).

[23] Waterson, *supra*, at 17-18; Int'l Advertising Ass'n, *Tobacco Advertising Bans and Consumption in 16 Countries* (J. Boddewyn 2d ed. 1986). *See also Economic Report of the President, supra*, at 186 ("Evidence from other countries suggests that banning tobacco advertising has not discouraged smoking."). Noting this fact, FTC Chairman Daniel Oliver has testified in Congress that an advertising ban is unlikely to reduce tobacco consumption. *April 1987 Hearing, supra*, Tr. 15-16. *See also* "FTC Chief Opposes Ad Limits," *Advertising Age*, Nov. 17, 1986, p. 103 (interview with Chairman Oliver). Elizabeth Whelan of the American Council on Science and Health—an outspoken opponent of the tobacco industry—likewise has stated that an advertising ban would "probably not" reduce cigarette consumption in this country. Whelan, "Second Thoughts on a Cigarette-Ad Ban," *Wall St. J.*, Dec. 18, 1985, at 28, col. 6.

Proponents of tobacco product advertising restrictions claim that in both Norway and Sweden there are fewer persons using tobacco now than when those countries allowed tobacco product advertising. But the incidence of smoking among adults overall had begun to decline in Norway *before* advertising was banned in 1975, and stabilized *after* the ban was imposed. In Sweden, cigarette advertising has *not* been completely banned, and in any event the incidence of smoking among adults also had begun to decline before special restrictions were imposed in 1979. As in Norway, the decline in smoking among adults in Sweden was more pronounced before the special advertising restrictions were imposed than afterward. *Tobacco Advertising Bans, supra*, at 22, 28. In 1984, nine years after the advertising ban was imposed in Norway, the proportion of all adult smokers in that country (42 per-

2044030863

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

The available evidence also indicates that advertising is not a significant influence on the decision by young people to smoke. Indeed, advertising apparently is one of the least significant factors so far as smoking by teenagers is concerned.[24] A recent five-country study discloses that the incidence of smoking among young people is in fact *higher* in many places where advertising is banned or restricted than where it is not.[25]

---

cent) was still more than *one-third higher* than the proportion of all adult smokers in the United States (about 31 percent).

[24] Waterson, *supra*, at 26-27; *1986 Hearings, supra* (statements of Roger D. Blackwell and Dr. J.J. Boddewyn). Dr. Mortimer B. Lipsett, Director of NIH's National Institute of Child Health and Human Development, testified in 1983 that "[t]he most forceful determinants of smoking [by young people] are parents, peers, and older siblings." *Smoking Prevention Education Act: Hearings on H.R. 1824 before the Subcomm. on Health and Environment of the House Comm. on Energy and Commerce,* 98th Cong., 1st Sess. 53 (1983). Even Michael Pertschuk, long an advocate of severe cigarette advertising restrictions, told a Harvard seminar in April 1983:

> "No one really pretends that advertising is a major determinant of smoking in this country or any other. * * * Smoking is such a complex form of behavior, and there are so many factors which affect smoking in this society —it's very difficult to isolate any particular one."

Tobacco Issues, Institute of Politics, Harvard University, April 27, 1983, Tr. 8-9.

[25] Int'l Advertising Ass'n, *Why Do Juveniles Start Smoking?* (J. Boddewyn ed. 1986). In Norway, for example, 11 years after a total advertising ban was imposed, the proportion of 7-15 year-olds who smoke regularly (13 percent) was nearly *twice* as high as in Spain (7 percent), where only minor advertising restrictions were in effect, and more than

2044030864

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

Those responsible for the *Central Hudson* and *Posadas* challenges made no showing that the primary purpose and effect of the advertising in question was to promote competition rather than increase overall demand. They also made no showing that restricting such advertising was not an effective means of dampening demand. It therefore was perhaps reasonable for the majority to assume that the utility in *Central Hudson*, and the casino in *Posadas*, would not have challenged the advertising restrictions at issue unless those restrictions served to dampen demand.[26] But tobacco product advertising, like advertising in other mature, adult markets, plays an entirely different role. For the reasons noted, the Synar/Whittaker proposals would serve only to impede competition rather than reduce demand. That is not a governmental purpose that would support severe restrictions on speech.

(b) *The Bills Would Not Satisfy the Least Restrictive Means Element of the* Central Hudson *Test*

The proposals also would not satisfy the fourth and final prong of the *Central Hudson* test—that restrictions on commercial speech be no "more extensive than is necessary" to serve the government's asserted interest. Notwithstanding *Posadas*, proponents of a tobacco product advertising ban would be required to defend the proposed ban as "narrowly crafted" to

---

four times as high as in Hong Kong (3 percent), where no advertising controls existed. *Id.* at 9. In Norway, 36 percent of all 15 year-olds smoked in 1986, while in Spain the figure was 27 percent and in Hong Kong the figure was 11 percent. *Id.* at 11. *See also 1986 Hearings, supra* (statement of Dr. Boddewyn).

[26] *See Posadas,* 106 S. Ct. at 2977; *Central Hudson,* 447 U.S. at 569.

2044030865

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

serve the government's purpose, and to establish that their goals could not adequately be served by any less restrictive means.[27] Obviously, a blanket ban on truthful tobacco product advertising could not be defended as "narrowly crafted" or as the "least restrictive" means of achieving any legitimate governmental purpose. For if a perceived problem can be addressed by providing *more* information, that alternative is by definition less restrictive than an alternative *limiting* communication.[28]

Time and again, the Supreme Court has applied Justice Brandeis's famous dictum that "the fitting remedy for evil counsels is good ones."[29] "Believing in the power of reason as applied through public discussion," he wrote, the Framers "eschewed silence coerced by law—the argument of force in its worst form."[30] Thus, in *Virginia State Board of Pharmacy*, the Supreme Court emphasized that government might require, to the limited extent needed to prevent deception, that commercial messages include appropriate qualifying information.[31] In case after case, the Court has emphasized that "the preferred

---

[27] *Zauderer*, 471 U.S. at 644, 647-49, 651-52 n.14; *accord, e.g., Bolger*, 463 U.S. at 80 (Rehnquist, J., joined by O'Connor, J., concurring in judgment); *Lowe* v. *SEC*, 472 U.S. 181, 234-35 (1985) (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in result).

[28] *See generally* Note, "The First Amendment and Legislative Bans of Liquor and Cigarette Advertising," 85 Colum. L. Rev. 632 (1985).

[29] *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (concurring opinion joined by Holmes, J.).

[30] *Id.* at 375-76.

[31] 425 U.S. at 771 n.24.

2044030866

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

remedy is more disclosure, rather than less." [32] For this reason, an outright advertising ban, judged by the Supreme Court's long-established commercial speech doctrine, would fail the fourth prong of the *Central Hudson* test.[33]

---

[32] *Bates*, 433 U.S. at 375. *See, e.g., Zauderer*, 471 U.S. at 651; *Central Hudson*, 447 U.S. at 570-71; *Linmark*, 431 U.S. at 97. The Supreme Court has yet to define the precise extent of the government's authority to require advertising to include warnings or disclosures but it has made clear that some disclosure requirements may be impermissible. *Zauderer*, 471 U.S. at 651. *Cf. PG&E* v. *PUC*, 106 S. Ct. 903 (1986) (requirement that utility include messages of its adversaries in its monthly billing envelopes violates the First Amendment).

Recently enacted federal legislation already requires cigarette advertising to carry four rotating health messages. This legislation also directs the Secretary of Health and Human Services to establish and carry out a broad program to educate the public with respect to "any dangers to human health presented by cigarette smoking." Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 3(a), 98 Stat. 2200 (1984) (codified at 15 U.S.C. § 1341(a)). Similar legislation has been enacted, even more recently, for smokeless tobacco products. Comprehensive Smokeless Tobacco Health Education Act, Pub. L. No. 99-252, § 2(a), 100 Stat. 30 (1986) (codified at 15 U.S.C. § 4401(a)). The Synar/Whittaker proposals seem particularly ironic and ill-timed in view of this recent action by Congress.

[33] Indeed, four Justices have expressed the view that if "more speech" cannot curtail demand for or use of a product, the government's only recourse is to attack the perceived problem directly and openly by forbidding or restricting use of the product—not by coerced silence. *See Central Hudson*, 447 U.S. at 573-79 (Blackmun, J., joined by Brennan, J., concurring in judgment); *id.* at 581 (Stevens, J., joined by Brennan, J., concurring in judgment); *Posadas*, 106 S. Ct. at 2980 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).

2044030867

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

4. The Significance of *Posadas*

In the light of the preceding discussion, it should be apparent that Justice Rehnquist's opinion for the 5-4 majority in *Posadas* is unlikely to provide a basis for sustaining a tobacco product advertising ban. The *Posadas* decision cannot be understood clearly, or be reconciled with the Supreme Court's other commercial speech decisions, without understanding the "unique cultural and legal history" of Puerto Rico (106 S. Ct. at 2976 n.6) and the politically delicate relationship between Puerto Rico and the United States—factors that appear to have played a large role in the majority's decision in the case. As Hector Reichard, Jr., a former Attorney General of Puerto Rico, has observed, "the Supreme Court often says that it applies the same constitutional principles to us as it does to Congress and the States. But in reality it is far more reluctant to interfere in our affairs." [34]

Specifically, the Court in *Posadas* was confronted with a situation in which Puerto Rico, whose economy depends heavily on tourist dollars, had elected to stimulate this source of revenue by legalizing an activity that had long been illegal—casino gambling. But it did not want to encourage its own citizens to engage in that "sophisticated" activity. 106 S. Ct. at 2977 (quoting Superior Court opinion). Had economic circumstances not required Puerto Rico to try to attract tourists by making casino gambling legal, it is unlikely that it would have decriminalized the activity at all. The *Posadas* majority was understandably reluctant to upset this arrangement—one that has no parallel on the United States mainland—

[34] Statement to the ABA House of Delegates on behalf of the Joint ABA/ANPA Task Force, Feb. 16, 1987, p. 3.

2044030868

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

by forcing the Commonwealth to make an economically self-defeating choice. To suppose that a majority of the Court would harbor a comparable reluctance when reviewing a complete ban on speech extending throughout the United States is to sever *Posadas* from its essential moorings.[35]

Moreover, the advertising restrictions at issue in *Posadas* were restrictions in name only. Since the restrictions focused on the audience to whom casino-gambling advertisements were "addressed," and not the audience they reached, the Court in *Posadas* was not in fact faced with advertising controls that, if approved, actually would keep people in ignorance.[36] The illusory quality of the *Posadas* restrictions undoubtedly goes far to explain the majority's readiness to defer to Puerto Rico's judgment as to the appropriateness of those restrictions. Because the *Posadas* restrictions by their nature could not manipulate con-

---

[35] The majority's special reluctance to interfere in Puerto Rico's affairs is illustrated both by its pointed reference to Puerto Rico's "unique cultural and legal history" (106 S. Ct. at 2976 n.6) and by its willingness to accept Puerto Rico's assertion that there was no inconsistency in the Commonwealth's decision to allow advertising for horse-racing, cockfighting, small games of chance at *fiestas*, and the lottery—while forbidding casino-gambling advertising. Puerto Rico justified this anomalous posture on the ground that those less "sophisticated" forms of gambling "have been traditionally part of the Puerto Rican's roots." 106 S. Ct. at 2977 (quoting Superior Court opinion). It is scarcely conceivable that the *Posadas* majority would have accepted such a patronizing assertion from New Jersey or Nevada—or from Congress.

[36] As noted above, counsel for Puerto Rico stated during oral argument in the Supreme Court that casino advertising in a Spanish-language daily with 99-percent local circulation would be permitted so long as the advertising "is addressed to tourists and not to residents." Oral Arg. Tr. 26.

2044030869

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

sumer behavior by suppressing information, that aspect of the majority's opinion in *Posadas* represents at bottom a brand of dicta—unusual dicta but dicta nonetheless.

Finally, as discussed above, there was no showing in *Posadas* that casino gambling advertising addressed to Puerto Ricans would serve any function except to stimulate overall gambling activity. It was not argued that such advertising simply constituted a means by which one casino sought to attract customers from other casinos and keep its own patrons loyal. In such circumstances it was perhaps understandable for the *Posadas* majority to assume that the casino in that case would not have litigated the case "all the way" to the Supreme Court (106 S. Ct. at 2977) unless the advertising restrictions in question would operate to reduce demand—and to assume that the Puerto Rico Legislature, in enacting the restrictions, shared this view. The Court in *Posadas* did not face a record—as it would in the case of tobacco product advertising—demonstrating that the advertising at issue served primarily as a vehicle for competition rather than to promote demand.[37]

---

[37] In sustaining the casino-gambling advertising restrictions, the *Posadas* majority pointed to other limited advertising restrictions, including the ban on cigarette advertising in the electronic media. 106 S. Ct. at 2980 n.10. Justice Rehnquist cited these other limited restrictions to illustrate his suggestion that a legislature may curb advertising of products or services whose sale it could prohibit. However, this suggestion was *dicta,* unnecessary to the holding in the case. *See* Congressional Research Service, "The Proposed Prohibition on Advertising Tobacco Products: A Constitutional Analysis," pp. 15-16, 19 (Dec. 30, 1986). The suggestion has been widely criticized as untenable by the most eminent constitutional scholars. *E.g., N.Y. Times,* Feb. 22, 1987, § E, p. 9 (interview with Professor Philip B. Kurland); Professor William Van

2044030870

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

Professor Philip B. Kurland of the University of Chicago Law School has cautioned that *Posadas* should not be relied upon because its reasoning, if taken at face value, "is so inconsistent with everything that has gone before." [38] His caution is well-founded. If one interprets the majority opinion in *Posadas* as deciding that the government has virtually unlimited power to suppress truthful speech concerning lawful products and services as long as there is no constitutionally protected right to purchase the products or services themselves, then almost all of the Court's commercial speech decisions since 1976 would now be open to reconsideration. Such analysis would militate in favor of sustaining, not invalidating, the advertising restrictions at issue in those cases, since the underlying activity in most of the cases was not constitutionally protected. Cautioning against such an expansive reading of *Posadas*, Assistant Attorney General Charles J. Cooper has observed that "it [would be] unusual for the Court to effect such a dramatic break with precedent without some explanation." [39]

Alstyne, letter dated Jan. 25, 1987, to Eugene Thomas, ABA President, and ABA Board of Governors. Justice Rehnquist also cited the cigarette advertising ban in the electronic media as an example of a case in which the legislature had "conclude[d]" that *more speech* would not curtail consumption of a controversial product or service. 106 S. Ct. at 2978. As discussed above, however, the available evidence, gathered in the 16 years since Congress banned cigarette advertising from the electronic media, demonstrates that *bans* do not curtail consumption of tobacco products.

[38] Interview, *N.Y. Times*, Feb. 22, 1987, § E, p. 9.

[39] Letter from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Feb. 9, 1987, to Henry G. Miller, Past President, New York State Bar Association, p. 1. The

2044030871

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

The implications of an expansive reading of *Posadas* are all the more alarming when one considers the precarious position of some constitutionally protected rights. For example, if the Supreme Court should overrule *Roe* v. *Wade*, 410 U.S. 113 (1973), the states would be free to outlaw advertising for abortion and abortion counseling services even if they elect to leave abortion itself legal; the result would be to nullify *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). Or if the Court were to overrule its decisions recognizing a right to purchase and use contraceptives (*e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)), nothing would prevent the states from banning the advertisement or display of contraceptives, even if the use of contraceptives remained lawful. That would negate *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977), and *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983). The protections of the First Amendment simply cannot be made to depend on the willingness of five Justices of the Supreme Court to hold that the activity being discussed is itself protected by the Constitution. Nothing in the Court's prior decisions ever has suggested such a radical rule. Just as clearly, the enunciation of such a rule certainly was not essential to the result in *Posadas*.

The Court in *Posadas* did not purport to overrule its prior cases in the area. To the contrary, the majority expressly reaffirmed the *Central Hudson* principles, which assure protection of the basic values

---

Court sometimes may chip away at its precedents but when the Court intends to effect a wholesale revision of its constitutional jurisprudence it says so expressly. *See, e.g., Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

2044030872

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

that led the Court to extend the First Amendment's guarantees to commercial speech in 1976. Absent a clear statement from the Court that *Central Hudson* is no longer good law, the majority opinion in *Posadas* must be viewed in the sensitive and special context presented by Puerto Rico's casino-gambling advertising restrictions. As Justice Rehnquist himself stated in an analogous context:

> "Since the Court saves harmless from its present opinion our prior cases in this area, * * * it may be fairly inferred that it does not intend the results which might otherwise come from a literal reading of its opinion." *Bigelow*, 421 U.S. at 836 (dissenting opinion).

* * *

In sum, the Synar/Whittaker proposals would represent a forbidden attempt by government to manipulate consumer choice by restricting the flow of truthful information about lawful products, irrationally impeding the intelligent exercise of consumer choice. The proposals also fail the literal terms of the four-part *Central Hudson* test, for it cannot be shown that they would directly and effectively serve the government's asserted interest or would do so in the least restrictive way. The majority opinion in *Posadas* endorsed and applied the *Central Hudson* test, rather than repudiating it. To read that opinion expansively, divorced from its essential context, cannot be justified.

COVINGTON & BURLING

2044030878

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000

2044030874

Source: https://www.industrydocuments.ucsf.edu/docs/pfbk0000